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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HAKEEM L. LOICE,

Defendant and Appellant.

B235060

(Los Angeles County  
Super. Ct. No. YA078816 )

APPEAL from a judgment of the Superior Court of the County of Los Angeles,  
James R. Brandlin, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Supervising  
Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and  
Respondent.

## INTRODUCTION

Following trial, a jury found defendant and appellant Hakeem Loice (defendant) guilty of the attempted murder of one victim and a separate assault on another victim by means likely to produce great bodily injury. On appeal, defendant contends that the trial court abused its discretion when it denied his motion to try separately the two unrelated crimes and that the prosecutor committed various acts of misconduct that denied him the right to a fair trial.

We hold that the trial court did not abuse its discretion when it refused to try separately the two charged crimes and that the prosecutor did not engage in any prejudicial misconduct. We therefore affirm the judgment of conviction.

## FACTUAL BACKGROUND

### **A. Count 1—Attempted Murder of Cole**

On April 10, 2010, at approximately 1:45 a.m., Rogers Cole left an apartment in the vicinity of 94th Street and Normandie after visiting two friends, Tanjy and Bud. As Cole began walking home, he was confronted by “some guys” and he engaged in a verbal argument with defendant. Defendant had facial hair, a red or orange cap and shirt, and “a lot of tattoos on his face.” The argument with defendant went on for “about five minutes” and then a “group of guys started fighting each other.” As Cole tried to walk away, he “got punched” in the face, “fell and got up and started fighting” with “the guy who . . . punched [him].” Initially, Cole was in a “one-on-one fight,” but then “a bunch of guys”<sup>1</sup> began hitting and kicking him. After about a minute, Cole was able to “get up and run.”

He ran down a long driveway toward an alley behind his friend’s apartment. After he had run about 30 yards, his attackers caught up to him and began to hit and kick him again. Cole was able to regain his feet, but as he did so, he saw “the barrel of a gun and a

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<sup>1</sup> According to Cole, somewhere between five and 15 men assaulted him.

flash.” Cole fell to the ground and, when he “tried to get up and run,” he fell back down after taking about five steps because he had been shot in the hip.

After unsuccessfully trying to regain his feet and run, Cole began to crawl away. As he crawled down the alley, he looked back and saw the man who shot him give the revolver to defendant. Defendant then walked toward Cole who was crawling. When defendant walked up to Cole’s location, Cole rolled over on to his back and looked up at defendant who was standing between Cole’s legs. Defendant fired approximately four shots.<sup>2</sup> Cole “played dead on [defendant],” who “walked off.”

About a minute later, Cole removed a cell phone from his pocket and called his girlfriend, Eureka Talbert. He thought she would be able to take him to the hospital faster than an ambulance. Cole told Talbert the location of the alley and instructed her to drive through the alley until she saw him. Talbert arrived at the alley at the same time as Cole’s friends Tanjy and Bud. Bud helped Cole into Eureka’s car, and she drove him to California Hospital.

Cole underwent surgery, and when he awoke, he noticed “a long surgery wound . . . from the top of [his] pubic area to the bottom of [his] chest.” Two days later he underwent a second surgery to repair damage from a gunshot wound to his right arm. Cole also had two gunshot wounds to his “side area” and one to his “underarm area.” He was hospitalized for five or six days.<sup>3</sup>

When Los Angeles County Sheriff’s Deputies arrived at the scene of the shooting, they searched for witnesses and physical evidence, but did not locate any witnesses or evidence. Similarly, the detective who investigated the scene confirmed that no firearms, bullets, or casings were recovered and no DNA or fingerprint evidence was recovered.

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<sup>2</sup> According to Cole, the revolver did not fire each time defendant pulled the trigger.

<sup>3</sup> The surgeon who treated Cole at California Hospital testified that Cole had a wound to his right chest, a wound to his right upper abdomen, a wound to his lower left chest, a wound to his right flank, a “through and through” wound on his left side, a through and through wound to his right forearm, and a through and through wound to his left hand.

About a month after the shooting, Cole reviewed a photographic lineup and identified defendant as the man who stood over him in the alley and shot him. Cole also identified defendant in court at both the preliminary hearing and the trial.

## **B. Assault on Chatman**

On the evening of April 25, 2011, the victim, Sayshawn Chatman, visited his friend Shawntae Perkins at her apartment. Chatman was wearing an expensive gold chain that evening. Some of Perkins's "home girls" and a "couple of male friends" were also there, including Perkins's cousin "Do-Boy." Chatman and the others drank vodka and gin that night, and eventually Chatman fell asleep.

Chatman woke up about 1:00 p.m. the next day and discovered that his gold chain was missing. When Chatman told Perkins his gold chain was missing, she told him to calm down and assured him she would find it. Chatman stepped outside the apartment for a moment, and Perkins brought him his chain.

About 1:15 p.m. that afternoon, Perkins left the apartment "to get something to eat." Shortly after Perkins left, Do-Boy emerged from a back room and opened the apartment door for defendant—whom Chatman had seen a week or two earlier walking down the street—and another man. Do-Boy walked past Chatman toward the bathroom, but then turned around and punched Chatman in the side of the face. Then Do-Boy, defendant, and the other man began punching, kicking, and stabbing Chatman. During the attack, Chatman was "balling up" in a defensive position with his eyes closed, barely able to defend himself. Chatman estimated that he was punched over 20 times and stabbed approximately five times. He was also kicked while he was on the ground causing him to lose a tooth.

Chatman was able to escape from his attackers and run down the street to where some neighbors were gathered watching their children. One of the neighbors called an ambulance.

After the attack, Chatman noticed that his gold chain was missing. Photographs of Chatman's injuries confirmed that he sustained gash wounds around his right eye, a cut

over his left eye, a cut under his chin, and cuts on the back of his head. During treatment for his wounds, Chatman received eight stitches above his right eye, three stitches in his left eyebrow, and nine staples in the back of his head.

A Los Angeles County Sheriff's deputy who arrived at the scene of the attack noticed a blood trail on the stairs leading to the apartment and, inside the apartment, he observed a broken wooden table in the center of the floor, various items scattered on the floor, and blood on the kitchen walls, floor, countertop, and refrigerator door.

A detective showed Chatman a photographic lineup, and Chatman was able to identify defendant as one of his attackers. Chatman also later identified defendant in court at the preliminary hearing and the trial.

## **PROCEDURAL BACKGROUND**

In an information, the Los Angeles County District Attorney charged defendant in count 1 with the attempted murder of Cole in violation of Penal Code sections 664 and 187, subdivision (a)<sup>4</sup> and in count 2 with an assault on Chatman by means likely to produce great bodily harm in violation of section 245, subdivision (a)(1). The District Attorney alleged as to count 1 that defendant personally and intentionally discharged a firearm which caused great bodily harm within the meaning of section 12022.53, subdivision (d) and that defendant had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The District Attorney further alleged as to counts 1 and 2 that defendant had suffered a prior serious or violent felony conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). The District Attorney also alleged that defendant had suffered four prior felony convictions for which prison terms were served.

Defendant pleaded not guilty and denied the special allegations. Following trial, the jury found defendant guilty on counts 1 and 2 and found the firearm enhancement

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<sup>4</sup> All further statutory references are to the Penal Code unless otherwise indicated.

true. Thereafter, the trial court found the strike and prior serious felony allegations true, struck the prior prison term allegations, and denied defendant's motion to strike the true finding on the prior strike allegation.

The trial court sentenced defendant to an aggregate sentence of 50 years comprised of an upper term nine-year sentence on count 1, doubled to 18 years based on the prior strike finding, plus an additional term of 25 years to life on the firearm allegation, and a consecutive seven-year sentence on count 2.

## **DISCUSSION**

### **A. Severance**

Defendant contends that the trial court abused its discretion when it denied his motion to sever and try separately counts 1 and 2. According to defendant, trying the two unrelated charges jointly was prejudicial because the evidence as to each count was not cross-admissible and the identification and other evidence as to each count was weak.

Section 954 provides in pertinent part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . ." That section further provides that "the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." Because joinder of charged offenses generally promotes efficiency, it "is the course of action preferred by the law." (*People v. Soper* (2009) 45 Cal.4th 759, 772 (*Soper*).) "[P]ursuant to section 954 an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) 'connected together in their commission,' or (2) 'of the same class.'" (*Soper, supra*, 45 Cal.4th at p. 771.)

"A defendant, to establish error in a trial court's ruling declining to sever properly joined charges, must make a "*clear showing of prejudice* to establish that the trial court

*abused its discretion . . . .*” [Citation.] A trial court’s denial of a motion to sever properly joined charged offenses amounts to a prejudicial abuse of discretion only if that ruling ““““falls outside the bounds of reason.”””” [Citation.] We have observed that ‘in the context of properly joined offenses, “a party seeking severance must make a *stronger* showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.”’ [Citations.] [¶] . . . [¶] In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, ‘we consider the record before the trial court when it made its ruling.’ [Citation.] Although our assessment ‘is necessarily dependent on the particular circumstances of each individual case, . . . certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.’ [Citation.]” (*Soper, supra*, 45 Cal.4th at p. 774.)

“First, we consider the cross-admissibility of the evidence in hypothetical separate trials. [Citation.] If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges. [Citation.] Moreover, even if the evidence underlying these charges would *not* be cross-admissible in hypothetical separate trials, that determination would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges. [Citation.] Indeed, section 954.1 [citation] codifies this rule—it provides that when, as here, properly joined charges are of the same class, the circumstance that the evidence underlying those charges would not be cross-admissible at hypothetical separate trials is, standing alone, insufficient to establish that a trial court abused its discretion in refusing to sever those charges.” (*Soper, supra*, 45 Cal.4th at pp. 774-775.)

“If we determine that evidence underlying properly joined charges would not be cross-admissible, we proceed to consider ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’ [Citations.] In making *that* assessment, we consider three additional factors, any of which—combined with our earlier determination of absence of cross-

admissibility—might establish an abuse of the trial court’s discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.” (*Soper, supra*, 45 Cal.4th at p. 775.)

Here, the two charges were unrelated, but both crimes were of the same class in that each involved assaultive behavior. And although the evidence underlying the two charges may not have been cross-admissible, that factor, standing alone, was insufficient to establish the prejudice necessary to justify severance. (See *People v. Myles* (2012) 53 Cal.4th 1181, 1201 [when two crimes of the same class are joined, cross-admissibility is not required].) Rather, it was incumbent on defendant—based on the record before the trial court at the time it made its ruling—to make a clear showing that the potential “spill over” effect from the evidence of the two unrelated crimes outweighed the benefits of joinder. For the reasons discussed below, we conclude that defendant failed to make the requisite showing.

Defendant’s contention concerning the severance issue is based on the assertion that this was a “close case” in which the evidence of guilt was weak. The preliminary hearing testimony that was before the trial court at the time it denied the motion to sever, however, does not support that assertion. The victims of each crime positively identified defendant in court at the preliminary hearing. Those identifications were based, in part, on the distinctive tattoos on defendant’s face. Moreover, each victim had the opportunity to observe defendant’s face at close proximity: Cole saw defendant take the gun from the man who initially shot Cole and then looked up at defendant from the ground as defendant walked toward him, stood over him, and then shot him; and Chatman had seen defendant before the attack walking in the neighborhood, and, on the day of the attack, he was in the living room of Perkins’s apartment when defendant entered that room with



another man at Do-Boy's invitation just prior to the assault on Chatman. That evidence shows that the District Attorney did not join a strong case with a weak case or join two weak cases together. Each count was supported by substantial, independent evidence, such that it was not reasonably likely that a jury would use evidence on one unrelated charge to convict defendant on the other charge.

The preliminary hearing testimony provided strong evidence of defendant's guilt on both charges and supported the trial court's conclusion that there was no reasonable probability that defendant would be prejudiced by a joint trial on those charges. Therefore, the trial court did not abuse its discretion when it denied the motion to sever.

## **B. Prosecutorial Misconduct**

Defendant argues that the prosecutor engaged in prejudicial misconduct by repeatedly delaying the disclosure of certain evidence. Defendant further contends that the prosecutor engaged in additional misconduct by asking a witness, Cole, improper questions concerning his fear of retaliation and misstating the evidence of the attack on Chatman during closing argument.

### *1. Legal Principles*

"The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"Furthermore . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284 [96 Cal.Rptr.2d 682, 1 P.3d 3].)"

(*People v. Morales*, *supra*, 25 Cal.4th at p. 44.) “At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. (See *People v. Bemore* (2000) 22 Cal.4th 809, 846 [94 Cal.Rptr.2d 840, 996 P.2d 1152]; *People v. Sandoval* (1992) 4 Cal.4th 155, 183 [14 Cal.Rptr.2d 342, 841 P.2d 862] [both speaking of the prosecutor’s entitlement in this regard].)” (*People v. Morales*, *supra*, 25 Cal.4th at p. 44.) “Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. (*People v. Avena* (1996) 13 Cal.4th 394, 420 [53 Cal.Rptr.2d 301, 916 P.2d 1000]; see also *People v. Lucas* (1995) 12 Cal.4th 415, 472 [48 Cal.Rptr.2d 525, 907 P.2d 373] [failure to object forfeited claim of misconduct for misstating facts].) A prosecutor’s ‘vigorous’ presentation of facts favorable to his or her side ‘does not excuse either deliberate or mistaken misstatements of fact.’ (*People v. Purvis* (1963) 60 Cal.2d 323, 343 [33 Cal.Rptr. 104, 384 P.2d 424].)” (*People v. Hill* (1998) 17 Cal.4th 800, 823.)

## 2. *Discovery Misconduct*

Defendant claims that the prosecutor delayed in turning over the following evidence to the defense: the police reports relating to Cole’s prior juvenile convictions; the field identification cards relating to Chatman; Cole’s statement to Talbert in the hospital; and crime scene photographs relating to the assault on Chatman.

Although it does not appear that the prosecutor engaged in misconduct with respect to most, if not all, of the delayed discovery claims, even assuming discovery misconduct occurred, defendant has failed to demonstrate how he was prejudiced under either the federal or state standard for determining prejudice discussed above. For example, although defendant complains that the prosecutor failed to turn over a file concerning one of Cole’s juvenile adjudications, he ignores that the prosecutor summarized the contents of the file for defense counsel in an e-mail sent immediately after the file was obtained and further offered to stipulate to the underlying facts of the adjudication in question. Given the timely summary of the file and the offered

stipulation, there was no potential that defendant was prejudiced by this claimed discovery misconduct.

Similarly, on the issue of the field identification cards, the prosecutor offered to stipulate to the factual information set forth in the cards, and the trial court offered defense counsel the opportunity to move for a continuance to investigate the cards and to request a jury instruction on late discovery, but defense counsel declined to pursue either suggested course of action, thereby conceding that defendant's case had not been prejudiced by the timing of the disclosure of the field identification cards.

As for the disclosure of Talbert's statement to Cole at the hospital, the prosecutors provided information about the statement to the defense as soon as the information was discovered by the prosecutor and, in any event, the trial court excluded the statement as cumulative. As to this claimed discovery misconduct, defendant fails to explain how he was prejudiced by a statement that was excluded and about which his counsel was informed in a timely fashion.

Defendant also complains that crime scene photographs that showed a blood trail at the scene of the assault on Chatman were not timely disclosed. But the trial court excluded the photographs, and defendant fails to explain how timely disclosure of them would have aided the defense.

### *3. Other Misconduct*

Defendant also challenges two other instances during which he claims the prosecutor engaged in misconduct. First, he contends that during the direct examination of Cole, the prosecutor improperly elicited that Cole had relocated out of state due to concerns for his safety based on his cooperation in this case. Second, defendant contends that during rebuttal argument, the prosecutor misstated the evidence when she argued that Do-Boy telephoned "his friends, including defendant."

The challenged line of questioning merely elicited that Cole had moved due to his fear of retaliation for cooperating in the case. It did not, as defendant contends, suggest or imply that defendant or someone associated with him had threatened Cole. Moreover,

the trial court offered to allow defense counsel to question Cole, either in the presence of the jury or outside the jury's presence, about whether defendant or anyone associated with him had threatened Cole and also indicated that it would consider giving a limiting instruction concerning a witness's fear. Defense counsel, however, did not question Cole about the issue and did not request a limiting instruction. Therefore, even assuming that the prosecutor's questions about Cole's fear and relocation were misconduct, defendant failed to demonstrate how he was prejudiced by those questions.

The prosecutor's assertion during argument that Do-Boy had telephoned his friends, including defendant, to assist in the assault on Chatman was based on a reasonable inference drawn from the evidence. Chatman testified that Perkins left the apartment, and shortly thereafter Do-Boy emerged from a back room and opened the apartment door for defendant and the other male assailant. The timing of the arrival of the two men shortly after Perkins left and Do-Boy's apparent awareness that the two men had arrived at the door, suggested that their arrival had been prearranged, presumably by Do-Boy in a telephone call. Because the prosecutor had wide latitude during argument to draw such an inference from the evidence, the challenged argument did not constitute misconduct.

## **DISPOSITION**

The judgment of conviction is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.